Supreme Court, U.S.
FILED
AUG 5 1988
JOSEPH E. SPANIOL, JR.
CLERK

(2)

No. 88-17

In The

Supreme Court of the United States

October Term, 1988

HERMAN BROTHERS, INC.,
and BULK, INC.

Petitioners,

vs.

TEAMSTERS LOCAL UNION NO. 430

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

Ira H. Weinstock, Respondent's Counsel of Record
Gerard M. Mackarevich
Ira H. Weinstock, P.C.
800 North Second Street
Harrisburg, Pennsylvania 17102
Phone: 717-238-1657
Counsel for Respondent

TABLE OF CONTENTS

Page

Table of Authorities i
Counterstatement of Case 1
Reasons for Disallowance of the Writ 1
Conclusion 7
Letter from Third Circuit to Parties ..... App. 1
Certificate of Service

TABLE OF AUTHORITIES

CASES Page

Fall River Dyeing & Finishing Corp. vs. NLRB,
____ U.S. ____, 107 S.Ct. 2225,
96 L.Ed. 22 (1987) 6

Howard Johnson Co. vs. Detroit Joint Board, Hotel and Restaurant Employees,
417 U.S. 249 (1974) 5, 6

John Wiley & Sons, Inc. vs. Livingston,
376 U.S. 543 (1964) 6

RULES

Federal Rules of Civil Procedure
Rule 11 ..... passim

COUNTERSTATEMENT OF CASE

The Respondent, Teamsters Local Union No. 430 (the "Union"), contests the representation made by the Petitioners that the Union "raised for the first time on appeal" the duty of the Petitioners to arbitrate under the doctrine of implied successorship. Petition, p. 6, *see also* p. 4, lines 8-9, sentence beginning with the words" "(t)he only arguments . . ." On the contrary, the record in this case demonstrates that the Union made use of the theory of implied successorship as early as the filing of the complaint. App. at A9-A10 and n.3, A17.

Two facts were deleted from the Petitioners' Statement of the Case. First, the Complaint was filed on August 16, 1985. Second, by letter dated September 16, 1986, after briefs had been filed by these parties with the Third Circuit on the merits of this case, the Third Circuit asked the parties to address two of its recent decisions that discussed successor liability. A copy of that letter is attached to this Brief as Appendix 1. One of the decisions on which the Court of Appeals asked comment actually post-dated the filing of the complaint.

REASONS FOR DISALLOWANCE OF THE WRIT

I. The decision below is in conformity with governing law and with Rule 11 itself.

The Union emphatically disputes the Petitioners' contentions that the decision below conflicts with decisions of other circuits and the language of Rule 11. While the Union agrees with the Petitioners' description of the governing law as being that Courts of Appeals have applied an objective

test to determine whether Rule 11 has been violated, the Union disagrees that the decision of the Third Circuit in this case conflicts in any way with that governing law. On the contrary, the record in this case shows that the Third Circuit in this case applied an objective test to determine that the conduct of the Union was reasonable under the circumstances at the time that the complaint was signed. App. at A7.

The Petitioners' contention that the Third Circuit deviated from governing law is based on a misrepresentation of the record. Specifically, the Petitioner represented that the Union did not raise this issue of implied successorship in front of the district court, but rather waited until the appellate stage to make such an argument. However, the texts of each of the Third Circuit opinions in this case contradict this representation. In its opinion addressing the Rule 11 determination, the Third Circuit stated: "The theory supporting the arbitration is evidenced by the arbitrator's decision as *incorporated in the complaint*". (Emphasis added) (footnote deleted). App. at A9. The court then set forth in a footnote the language of the arbitral decision that has been incorporated into the complaint. That language listed a variety of facts on which the arbitrators based their decision that the Petitioners herein were "successors":

> Based on the facts presented, including the fact that Lehigh Portland Cement arranged the equipment transaction between Cement Express and Herman Brothers/Bulk, Inc.; the fact that all Cement Express former employees were offered employment by Lehigh/Herman Bros./Bulk; that the only two employees used during start-up were former Cement Express employees, and the fact that

> the two management representatives of Herman Bros./Bulk were fully aware of all terms and conditions, including the successorship obligations of the EACHA when this operation was taken over in this manner, it is the decision of this Committee that Lehigh Portland Cement Company, Herman Brothers, Inc./Bulk, Inc. were "successors" under the law and the contract and were obligated by all its terms. The grievance is upheld.

App. at A9-A10 and n.3

Moreover, in its opinion addressing the summary judgment determination, the Third Circuit noted "facts of continuity" alleged by the Union in the complaint "to justify an obligation to arbitrate". App. at A17.

Accordingly, it is absurd to assert, as do the Petitioners, that the case for implied successorship was made by the Union for the first time at the appellate stage. For the same reasons, the Petitioners' framing of the key issue is nonsensical. As articulated by the Petitioners, such purported issue is "whether the mere existence of '. . . a good faith argument for the extension, modification, or reversal of existing law' can insulate counsel from the imposition of sanctions, although the 'argument' was never made on the merits of the case." Petition, p. 9. As demonstrated by the texts of the Third Circuit opinions, this statement of the issue makes no sense. It is evident that the Union made the argument for the extension of the successorship doctrine to the facts of this case on the day that the complaint was filed.

The Petitioners also assert that the prevailing law on Rule 11 requires the conduct of the signer of the pleading to be judged by the arguments that he eventually made in support of the pleading, not by the arguments that he could have made, but did not. They argue that the Third Circuit is in conflict with this prevailing law on account of language in the opinion in question as follows: "The Rule 11 question . . . is whether at the time he filed the complaint, counsel . . . could reasonably have argued in support (of the complaint)." App. at All.

In making this argument, the Petitioners mischaracterize the holding of the court below. In stressing the above quotation, they imply that the Third Circuit held that Rule 11 sanctions are inappropriate if any conceiveable argument could be made at the time of the signing of the complaint, even if such argument were not, in fact, made. Most assuredly, this was not the holding of the Third Circuit. Such a holding would have been nonsensical given the record in this case, in which the Third Circuit acknowledged in the texts of both its opinions that facts supporting the argument for implied successorship were, in fact, set forth in the complaint. App. at A9-A10 and n.3; App. at A17. In addition, the record reveals that, subsequent to the filing of the complaint, the Union set forth additional factual averments relating to the successorship issue. Specifically, the Union's Reply to Amended Statement of Undisputed Facts, submitted as part of the Union's response to the Petitioners' dispositive motions before the district court, alleged additional "facts of continuity" linking Petitioner Bulk, Inc. to the previous contractor who was a signatory to the collective bargaining agreement. App. at A17.

Finally, the best indication that the argument in support of the doctrine of successorship was actually made in

litigation before the district court is the following language contained in the court's opinion granting summary judgment against the Union:

> Based upon this analysis, we find that Bulk and Herman Brothers are not bound by the terms of the (collective bargaining agreement). Defendants have neither expressly agreed to honor the (collective bargaining agreement) *nor have they implicitly assumed it by their actions.*

App. at A25 (emphasis added).

With the emphasized language, the district court acknowledged and rejected the argument of implied successorship. There can be no better indication that the Union had raised the issue on the merits, contrary to the representations of the Petitioners herein.

For all of the foregoing reasons, the Union respectfully asserts that the Third Circuit's opinion is in conflict with neither the law of other circuits nor Rule 11 itself. Despite the Petitioners' representations to the contrary, the Third Circuit applied an objective test to the actions of the Union in filing the complaint and based its determination on issues and arguments of record raised before the district court.

II. The decision below is in accordance with the law of the Court.

The Petitioners contend that the opinion of the Third Circuit is in conflict with the law of this court, particularly the decision of *Howard Johnson Co. v. Detroit Joint Board,*

Hotel and Restaurant Employees, 417 U.S. 249 (1974). However, the very quotation that the Petitioners chose to illustrate the holding of that decision undermines their argument:

> The mere existence of the successorship clauses in the bargaining agreements between the Union and the (predecessors), however, cannot bind (the successor) either to the substantive form of the agreement or to the arbitration clauses thereof, *absent the continuity required by Wiley* . . .

417 U.S. at 258, n.3 (emphasis added).

The reference to "Wiley" was, of course, to this Court's decision in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). The emphasized portion of the quotation from the *Howard Johnson* decision illustrates that special circumstances can arise under which a successor can be bound by the terms of a collective bargaining agreement that it has not signed. By incorporating in the complaint the actual arbitral decision, which contained key factors linking predecessor to successor, the Union was alleging facts of continuity in order to bring itself within the scope of *Wiley* and its progeny. App. at A9-A10 and n.3.

The quotation from *Howard Johnson* and its reference to *Wiley* also illustrates that point that the law of successorship liability is not unchangeable. *See generally Fall River Dyeing & Finishing Corp. vs. NLRB,* ____ U.S. ____, 107 S.Ct. 2225, 96 L.Ed.2d 22 (1987). The Third Circuit in the instant matter did not defy the established law of this Court. Rather, it followed that law in recognizing, where the district court did not, that under some circumstances a successor

may be held to the terms of a collective bargaining agreement that it had not signed.

There is no better example of the dynamic nature of the law of successorship than the fact that, around the time when the complaint was filed, the Third Circuit had recently decided one case and had yet to decide another case, both of which discussed issues of successorship. During the Union's appeal on the merits, the Third Circuit solicited comment from the parties herein on the applicability of those cases. A copy of the Third Circuit letter to the parties is attached to this brief as an Appendix.

The letter was issued *more than a year after* counsel for the Union filed the complaint. One of the decisions on which the Third Circuit sought comment was decided *almost a year after* the complaint was filed. Given the time sequence of these events, the Third Circuit's opinion that the Union's filing of the complaint was not unreasonable at the time it was filed is persuasive indeed.

CONCLUSION

For the reasons set forth above, the Union respectfully requests that the Court disallow the writ.

Respectfully Submitted,
ON BEHALF OF APPELLEES

By: _____ By: _____
IRA H. WEINSTOCK
Counsel of Record
GERARD M. MACKAREVICH

DATED: August 4, 1988

OFFICE OF THE CLERK

SALLY MRVOS
CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA 19106-1790

TELEPHONE
215 597-2995

September 16, 1986

SEP 18 1986

(Ira H. Weinstock, Esq.
(Paul J. Dellasega, Esq.

Walter J. Flamm, Jr., Esq.

(Larry J. Rappoport, Esq.
(Charles J. Bloom, Esq.

Re: Teamsters Local Union No. 430, Appellant
v.
Cement Express, Inc., et al.,
Docket Nos. 86-5197 and 86-5251

Dear Counsel:

The Court wishes counsel in the above-entitled case to comment on the following questions:

1. In light of Becton Dickinson and Company v. District 65, No. 85-5776 filed July 25, 1986, can we consider the appellant's appeal with respect to the award of counsel before the amount of the award is fixed.

2. Comment on the applicability of American Bell, Inc. v. Federation of Telephone Workers, 736 F.2d 879 (3d Cir. 1984) and AT&T Information Systems, Inc. v. Local 13000 Communications Workers of America, AFL-CIO, Nos. 85-1379 and 85-1400 filed August 1, 1986.

Counsel should respond simultaneously by letter within seven days of the date of this letter. An original and three copies of the letter should be filed together with proof of service on opposing counsel.

Very truly yours,

SALLY MRVOS, Clerk

By: M. E. Angelotti Sergeant
Chief Deputy Clerk

MEF:as

APPENDIX I

CERTIFICATE OF SERVICE

AND NOW, this 5th day of August, 1988, I, Ira H. Weinstock, Counsel of Record for Respondent, hereby certify that I served three (3) copies of the foregoing **BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** by depositing the same in the United States mail, postage prepaid, in the post office at Harrisburg, Pennsylvania, addressed to, by first class mail:

Walter H. Flamm, Jr.
Clark, Ladner, Fortenbaugh & Young
32nd Floor, 1818 Market Street
Philadelphia, PA 19103

By: Ira H Weinstock
IRA H. WEINSTOCK